APPENDIX

RULES, STATUTES, CONSTITUTIONAL PROVISIONS INVOLVED AND CONGRESSIONAL LEGISLATIVE HISTORY

Federal Rules of Criminal Procedure.

RULE 7. THE INDICTMENT AND THE INFORMATION.

(a) Use of Indictment or Information. * * * An offense which may be punished by imprisonment for a term exceeding one year * * * shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information.

(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year * * * may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents. The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * * error in the citation * * * does not vitiate the indictment unless the error * * * has misled the defendant to his prejudice.

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

(a) Two or more offenses may be charged in the same indictment * * * in a separate count for each offense if the offenses charged * * * are of the same or similar character based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan;

RULE 23. TRIAL BY JURY OR BY THE COURT.

(a) Trial By Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

RULE 32. SENTENCE AND JUDGMENT.

(a) Sentence. * * * Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

RULE 35. CORRECTION OR REDUCTION OF SENTENCE.

The court may correct an illegal sentence at any time. * * *.

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Title 26, secs. 7237 U. S. Code.

P. L. 728, 84th Cong., 2d Sess., § 103:

Prior to amendment of 7 19 56—7237 read as follows:

"(a) Violation of Law Relating to Opium and Coca Leaves and Marihuana.—Whoever commits an offense or conspires to commit an offense described in Part I, or Part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. *Upon conviction for a*

second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2(c) of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C. 174). P. L.-1, 84th Cong., 1st Session, effective 1/20/55.

Sec. 7237 and 7237(a) as it pertains to National Narcotic Control Act:

[Sec. 7237]

Sec. 7237. Violation of Laws Relating to Narcotic Drugs and to Marihuana.

[Sec. 7237(a)]

(a) Where No Specific Penalty Is Otherwise Provided. —Whoever commits an offense, or conspires to commit an offense, described in Part I or Part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

Source as originally enacted in 1954 Code: Sec. 2557(b)(1), 1939 Code, substantially unchanged.

Amendments:	Sec. as amended effective
P. L. 728 84th Cong., 2nd Sess., § 103	7-19-56

[Sec. 7237(c)]

(c) CONVICTION OF SECOND OR SUBSEQUENT OFFENSE.—

(1) PRIOR OFFENSES COUNTED.—For purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C., sec. 174), and the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in—

(A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C., sec. 174);

(B) the Act of July 11, 1941 (21 U.S.C., sec. 184a);

(C) section 9 of the Act of December 17, 1914 (38 Stat. 789);

(D) section 1 of the Act of May 26, 1922 (42 Stat. 596);

(E) section 12 of the Marihuana Tax Act of 1937 (50 Stat. 556); or

(F) section 2557(b)(1) or 2596 of the Internal Revenue Code of 1939.

For purposes of determining prior offenses under the preceding sentence, a reference to any subsection, section, or Act providing a penalty for an offense shall be considered as a reference to such subsection, section, or Act as in effect (as originally enacted or as amended, as the case may be) with respect to the offense for which the offender previously has been convicted.

* * * * *

[Sec. 7237(d)]

(d) NO SUSPENSION OF SENTENCE; NO PROBATION; ETC.—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4802 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply.

Amendments:	Sec. as amended effective
P.L. 728, 84th Cong., 2d Sess., § 401	7-19-56

P. L. 728, 84th Cong., 2d Sess., § 403:

Added Sec. 7237(d) to read as above.

Effective under § 401, 7-19-56.

ARTICLE V—(FIFTH AMENDMENT) to the fifth article of the original Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; * * *.

ARTICLE VI—(SIXTH AMENDMENT); same as above:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; * * *.

ARTICLE VIII—(EIGHTH AMENDMENT); same as above:

* * * Excessive bail shall not be required, not excessive fines imposed, nor cruel and unsual punishments inflicted.

ARTICLE IX—(NINTH AMENDMENT); same as above:

The enumerations in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(* * * nor deny to any person the equal protection of the laws?)

TITLE 18, Section 371, U.S.C.A.

If two or more persons conspire either to commit any offense against the United States or defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *.

TITLE 21, Section 174, U.S.C.A.

The text of this section as it appeared in the statute books before and after 7-19-56 is reproduced in the appendix on pp. 16a and 17a.

The important part as it relates to Carminati has been emphasized by printing those words connected therewith in bold face type.

HOUSE OF REPRESENTATIVES
84th Congress, 2d Session

Report No. 2388

NARCOTIC CONTROL ACT OF 1956

REPORT

[To accompany H. R. 11619]

The Committee on Ways and Means, to whom was referred the bill (H. R. 11619) to amend the Internal Revenue Code of 1954 and the Narcotic Drugs Import and Export Act to provide for a more effective control of narcotic drugs and marihuana, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

I. Purpose

Your committee's bill, H. R. 11619, would amend the provisions of the Internal Revenue Code of 1954 and of certain other Federal statutes relating to the control of narcotic drugs and marihuana so as to provide more effective means for the eradication of the illicit trafficking in these drugs and for the elimination of the illegal uses of these drugs.

Your committee is unanimous in urging the enactment of H. R. 11619.

II. General Statement

A. *Principal Features of H. R. 11619*

* * * * * * *

3. *Penalty provisions.*—The penalty provisions of the Internal Revenue Code of 1954 applicable to narcotic drugs and marihuana would be amended so as to increase the

mandatory minimum sentence in the case of the trafficker and increase the permissive maximum sentence in the case of both the possessor and the trafficker. At the present time all first offenders are subject to a minimum mandatory sentence of 2 years and a permissive maximum of 5 years; all second offenders, 5 to 10 years; and all third and subsequent offenders, 10 to 20 years. For the trafficker, the penalties would be made a mandatory minimum of 5 years for the first offense and a permissive maximum of 20 years; and for second and subsequent offenses the mandatory minimum would be 10 years with a permissive maximum of 40 years. * * * There would be a prohibition on the granting of probation, suspension of sentence, or parole with respect to any of the increased penalties applicable to traffickers. * * *

* * * * * * * * * * *

B. Description of H. R. 11619

1. *Short title.*—Section 1 of your committee's bill would provide a short title for H. R. 11619 so that it could be cited as the "Narcotic Control Act of 1956."

* * * * * * * * * * *

Section 3 of your committee's bill adopts the language style of a similar section in the Harrison Narcotic Act, section 4724(b) of the Internal Revenue Code of 1954, so as to clarify the scope of the prohibition. The section does not apply to persons who shall have registered and paid the required special tax, nor to employees of such persons while acting in the scope of their employment, to common carriers, to persons who have lawfully secured marihuana, or to officers engaged in the enforcement of Federal or State laws relating to marihuana.

4. *Penalties.*—Section 4 of H. R. 11619 would amend the penalty provisions of the Internal Revenue Code of 1954 relating to narcotic drugs and marihuana. Penalties (unless otherwise stated) that would be provided by the section are:

First offense—a discretionary fine of not more than $20,000 and imprisonment for not less than 2 years nor more than 10 years.

Second offense—a discretionary fine of not more than $20,000 and imprisonment for not less than 5 years nor more than 20 years.

Third or subsequent offense—a discretionary fine of not more than $20,000 and imprisonment for not less than 10 years nor more than 40 years.

The above penalties would be applicable to persons in illegal possession.

No probation, suspension of sentence, or parole would be granted to a second or subsequent offender. * * *

* * * * * * * * * * *

Subsection (c) of the proposed section 7237 would specify the offenses which shall be considered and counted as previous offenses in order to determine if a person is a second or subsequent offender. Present law provides a procedure to be followed in proving a second or subsequent offense after conviction in all cases for which increased penalties are provided. **Your committee's bill would clarify the offenses that constitute prior convictions for purposes of the act.**

* * * * * * * * * * *

7. *Penalties for violating the Narcotic Drugs Import and Export Act.*—Section 7 would amend section 2(c) of the Narcotic Drug Import and Export Act, as amended (21 U.S.C. 174), by increasing the penalties for violation of that statute. The present first offense penalty would be increased from a minimum 2 years and a maximum 5 years imprisonment to a minimum of 5 years and a maximum of 20 years. A second or subsequent offender would be subject to a minimum imprisonment of not less than 10 years and a maximum imprisonment of not more than 40 years. A discretionary fine of not more than $20,000 would be al-

lowed for a first or subsequent offense. Under the present law a second offender is subject to imprisonment of not less than 5 nor more than 10 years and a third or subsequent offender is subject to imprisonment for not less than 10 nor more than 20 years. At present a mandatory fine of not more than $2,000 applies to all offenses. Under the present law probation and suspended sentence are available for first offenders and parole is available to all offenders. The proposed amendment contained in your committee's bill would provide that probation, suspension of sentence, and parole would not be available to any offender. * * *

* * * * * * * * * * *

C. Need for the Legislation

* * * * * * * * * * *

2. *Legislation and enforcement.*—During the 19th century and the early years of the 20th century there was little governmental control over the use of narcotic drugs within the United States. At the present time the manufacture, importation, distribution, and use of narcotic drugs are subject to Federal, State, and local control and regulation. The basic statute providing Federal controls is the Harrison Narcotic Act, enacted in 1914, and subsequently made a part of the Internal Revenue Code. The other two principal Federal statutes which specifically control narcotic drugs and marihuana are the Narcotic Drugs Import and Export Act and the Marihuana Tax Act. The Harrison Narcotic Act provides the machinery through which the Federal Bureau of Narcotics is able to exercise control over the distribution of narcotic drugs within the country. The Narcotic Drugs Import and Export Act allows the Commissioner of Narcotics to control the importation of opium and coca leaves and the exportation of manufactured narcotic drugs and preparations. It prohibits the importation of opium prepared for smoking purposes. It also prohibits the importation of opium for the manufacture of heroin. The Marihuana Tax Act, by requiring the registration and

payment of tax, controls the traffic in marihuana. In addition, the United States smuggling law is applicable to the illegal entries of drugs. Your committee's bill would make the smuggling of marihuana a specific offense under the Narcotic Drugs Import and Export Act.

The Department of the Treasury is the principal Federal agency with responsibility for the enforcement of these laws. This responsibility arises from the fact that the Federal narcotic laws are revenue measures. There are two bureaus within the Department of the Treasury involved in narcotic law enforcement. The Bureau of Narcotics, established in 1930, in the Department of the Treasury, is responsible for regulating, supervising, and controlling the importation and manufacture of narcotics for legal uses and the registration of those persons concerned with such uses. In addition the Bureau of Narcotics is responsible for the apprehension of those found to be violators of the narcotic laws. The Bureau of Customs in the Department of the Treasury is responsible for the prevention of smuggling and cooperates with the Federal Bureau of Narcotics in combating the illicit narcotic traffic.

* * * * * * * * * * *

3. *Penalties.*— * * * It is the view of your committee that the imposition of heavier penalties is the strongest and most effective deterrent to narcotic addiction and illicit drug traffic.

The enactment of Public Law 255 of the 82d Congress, the so-called Boggs law, in 1951, has been largely responsible for turning the rising tide of the illicit narcotic and marihuana traffic and addiction. The Boggs' law for the first time imposed minimum mandatory sentences for violations of the narcotic and marihuana laws. It provides a penalty of not less than 2 years nor more than 5 years for a first offense; not less than 5 years nor more than 10 years for a second offense; and for a third or subsequent offense, not less than 10 years nor more than 20 years. It also pre-

scribes a mandatory fine of not to exceed $2,000. For second or subsequent offenses it prohibits probation or suspension of sentence. * * *

In evaluating the effectiveness of the presently prescribed penalties, it must be recognized that special incentives in our penal system serve to decrease the actual time spent in a penal institution under a sentence imposed by a court. The violator is eligible for parole after serving one-third of his sentence. As is true of all Federal violators, he is eligible for conditional release after serving two-thirds of his sentence. * * * This mitigation of sentence tends to defeat the purposes of Public Law 255 and in the view of your committee should be corrected by the establishment of more severe mandatory minimum sentences and permissive maximum sentences as provided in H. R. 11619. * * *

* * * * * * * * * * *

It is the view of your committee that the illicit drug trafficker, whether he be a first offender or an offender with previous convictions, must be severely punished. The illicit traffic can only be eradicated by the establishment of laws by the Congress that will enable enforcement officials to effectively and vigilantly work to apprehend the trafficker and that will enable the courts to justly impose sentences that are commensurate with the horrendous nature of the offense involved.

* * * * * * * * * * *

III. Conclusion

Experience with the Boggs law, Public Law 255 of the 82d Congress, since its enactment on November 2, 1951, has clearly demonstrated the efficacy of severe punishment in reducing the illicit commerce in drugs. It is the view of your committee that the passage of H. R. 11619 will provide our Federal enforcement officials and the Federal judiciary with the means to bring about a sharp reduction and perhaps the elimination of the illicit drug traffic in the United States. The compelling need for success in this

endeavor and the danger to our society of failure to achieve that success warrant prompt action by the Congress. Accordingly, your committee is unanimous in urging favorable action on H. R. 11619.

IV. Changes in Existing Law

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

INTERNAL REVENUE CODE OF 1954

* * * * * * * * * * *

[SEC. 7237. VIOLATION OF LAWS RELATING TO NARCOTIC DRUGS AND TO MARIHUANA.

* * * * * * * * * * *

SEC. 7237. Violation of Laws Relating to Narcotic Drugs and to Marihuana.

(a) Where No Specific Penalty Is Otherwise Provided.—Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a third or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

(b) Sale or Other Transfer Without Written Order.—Whoever commits an offense, or conspires to commit an offense, described in section 4705 (a) or section 4742 (a) shall be imprisoned not less than 5 or more than 20 years

and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and—

(1) the offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

(2) the offense consisted of a conspiracy to commit an offense described in paragraph (1),

the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

(c) Conviction of Second or Subsequent Offense.—

(1) Prior offenses counted.—for purposes of subsections (a), (b), and (d) of this section, subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), and the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in subsection (a) or (b) of this section or in—

(A) subsection (c) or (h) of section 2 of the Narcotic Drugs Import and Export Act (21 U. S. C. sec. 174);

* * * * * * * * * *

For purposes of determining prior offenses under the preceding sentence, a reference to any subsection, section, or Act providing a penalty for an offense shall be considered as a reference to such subsection, section, or Act as in effect (as originally enacted or as amended.

as the case may be) with respect to the offense for which the offender previously has been convicted.

(2) Procedure.—After conviction (but before pronouncement of sentence) of any offense the penalty for which is provided in subsection (a) or (b) of this section, subsection (c) or (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in subsection (a) or (b) of this section, subsection (c) or (h) of such section 2, or such Act of July 11, 1941, as amended, as the case may be.

(d) No Suspension of Sentence; No Probation; Etc.—Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c) or (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as amended, shall not apply.

* * * * * * * * * * * *

SECTION 2 OF THE NARCOTIC DRUGS IMPORT AND EXPORT ACT, AS AMENDED (before 7/19/56)

SEC. 2. (a) * * *

* * * * * * * * * * * *

[(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two ~~or more than five years~~. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. **Upon conviction for a second or subsequent offense,** the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557 (b) (1) of the Internal Revenue Code, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended;

section 1, chapter 202 of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557 (b) (1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

[Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.]

(After 7/19/56)

(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. **For**

a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), *the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.*

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 377—October Term, 1959.

(Argued June 16, 1960 Decided August 22, 1960.)

Docket No. 26273

UNITED STATES OF AMERICA, *Appellee*,

v.

MICHAEL GALGANO, *Appellant*.

UNITED STATES OF AMERICA, *Appellee*,

v.

ANTHONY CARMINATI, *Appellant*.

Before:

WATERMAN, MOORE and HAMLIN,*

Circuit Judges.

Appeals from orders of the United States District Court for the Southern District of New York, Weinfeld, *J.*, deny-

ing appellants' motions for correction of sentence under 28 U. S. C. § 2255. Affirmed.

S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York (Gerald Walpin, George I. Gordon, Asst. United States Attorneys, of counsel), *for Appellee.*

Dodd, Cardiello & Blair, New York City, *for Galgano.*

I. William Stempil, Washington, D. C. (William Weintraub, Brooklyn, N. Y., of counsel), *for Carminati.*

Waterman, *Circuit Judge*:

On November 19, 1956 appellants Michael Galgano and Anthony Carminati were charged in Count 14 of a fourteen count indictment with having conspired with other named persons to violate certain specified sections of the federal narcotics laws. Omitting the twenty-three overt acts appended to the count, Count 14 is set forth in its entirety in the footnote.[1]

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* Of the Ninth Circuit, sitting by designation.

[1] FOURTEENTH COUNT

1. Commencing on or about the 1st day of January, 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York, Salvatore Russano, Ralph Russano, Anthony Carminati, William McKenney, Jr., Frank Rich, Robert Guippone, Joseph Ambrosini, Carlos Ruiz, Mary Lou Brolet Russano, Sebastian Della Universita, Michael Botto, Michael Galgano, David Shackelford, Donald Bauer and Ada Volkell, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and "John Doe" also known as Wilson, white male, blond hair, 30-35 years of age, approxi

After trial before Judge Weinfeld and a jury appellants on January 14, 1957 were found guilty. On February 5,

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mately 5'11" tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid any United States Internal Revenue Stamps as required by Section 4703, of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a) and 4771(a) of Title 26, United States Code.

3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

• • • • •

(Title 18, United States Code, Section 371).

s/ Paul W. Williams
PAUL W. WILLIAMS
United States Attorney

s/ John G. Winchester
Foreman

1957 Galgano was sentenced to a term of ten years imprisonment as a second offender under 21 U. S. C. § 174.[2] Carminati's sentencing was adjourned for nine days and on February 14 a similar ten year sentence was imposed upon him. The convictions were affirmed by this court, *sub nom. United States* v. *Carminati*, 247 F. 2d 640 (2 Cir. 1957), and certiorari was denied, 355 U. S. 883.

Thereafter appellants each moved under 28 U. S. C. § 2255 for corrections of sentence. Galgano's motion was denied on September 2, 1959, reported *sub nom. United States* v. *McKenney*, 181 F. Supp. 143; Carminati's on February 18, 1960. Each contends that he should not have been sentenced under 21 U. S. C. § 174, but instead was required to be sentenced under 18 U. S. C. § 371, the general conspiracy statute, which provides for a five year maximum sentence. In addition, as an independent ground, Carminati contends that he should be sentenced anew because the sentencing judge failed to afford him the "right of allocution" provided for in Rule 32(a) of the Federal Rules of Criminal Procedure.

Appellants' contention relative to 18 U. S. C. § 371 rests upon the parenthetical citation of that section at the end of Count 14. (See footnote 1, *supra*.) We reject appellants' argument that this citation precluded conviction under any other section. It is clear that when an indictment charges conduct which is violative of a particular statute

[2] The writer of the present opinion points out that this is contrary to the opening statement made by him in the prior opinion of affirmance, 247 F. 2d 640, 642. The trial record makes clear that at the time of sentence Galgano's attorney, an attorney other than his present counsel, argued at length that the trial judge could impose sentence only under 18 U. S. C. § 371. The argument was rejected, the judge stating: "If I am wrong of course on the sentence the Court of Appeals will decide it. It is a very simple question." However, this question, though so discussed below, was not then raised by any of the three appellants whose appeals were decided by the opinion at 247 F. 2d 640.

the individual charged may be convicted under that statute even though the statute is not specified in the indictment. Rule 7(c) Federal Rules of Criminal Procedure; *United States* v. *Kolodny*, 149 F. 2d 210, 211 (2 Cir. 1945). Count 14 charges a conspiracy to violate 21 U. S. C. §§ 173, 174. Such a conspiracy, if proven, constitutes in itself a violation of 21 U. S. C. § 174. Similarly, Count 14 charges a conspiracy to violate 26 U. S. C. §§ 4704(a), 4701, 4703, 4724(c), and 4771(a); and such a conspiracy, if proven, constitutes a violation of 26 U. S. C. § 7237(a). Accordingly, while the citation of 18 U. S. C. § 371 may have been either mistaken or duplicitous, it did not prevent conviction for conspiracy under 21 U. S. C. § 174, or, for that matter, under 26 U. S. C. § 7237(a).

It is the rule in this circuit that an erroneous citation in an indictment will not be cause for reversing a conviction unless the defendant shows that he was prejudiced by the miscitation, *United States* v. *McKnight*, 253 F. 2d 817, 820 (2 Cir. 1958). Appellants seek to show that in the preparation of their defense they were prejudiced, and were further prejudiced by the judge's charge to the jury that Count 14 was "bottomed" upon 18 U. S. C. § 371. As to the first point we see no way in which a defense to an accusation under 18 U. S. C. § 371 would differ from a defense to a combined accusation of conspiracy in violation of 21 U. S. C. § 174 and 26 U. S. C. § 7237(a). In each case the matters the Government would be required to prove, and the statutory presumptions the defendant might be required to rebut, would be the same. As to the judge's charge, apparently appellants would have us believe that the jury could have been led to convict on a lesser quantum of evidence because appellants would receive lesser penalties under 18 U.S.C. § 371. We certainly cannot attribute to the jury any such improper conduct.

On the question of duplicity, Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides that defects in

an indictment, other than those relating to lack of jurisdiction in the court or to a failure to charge an offense, may be raised only by motion before trial. The cases have consistently held that an objection to the indictment on grounds of duplicity is waived unless this objection is presented to the court prior to trial, *United States* v. *Private Brands, Inc.*, 250 F. 2d 554, 557 (2 Cir. 1957), *cert. denied*, 355 U. S. 957; *Beauchamp* v. *United States*, 154 F. 2d 413, 415 (6 Cir. 1946), *cert. denied*, 329 U. S. 723, *rehearing denied*, 329 U. S. 826; *Lemon* v. *United States*, 164 Fed. 953, 958 (8 Cir. 1908); cf. *United States* v. *Garnes*, 156 F. Supp. 467, 470-71 (S. D. N. Y. 1957), *aff'd*, 258 F. 2d 530 (2 Cir. 1958), *cert. denied*, 359 U. S. 937, or, at the very least, unless the objection is raised prior to the verdict, *Durland* v. *United States*, 161 U. S. 306, 315 (1896); *Witt* v. *United States*, 196 F. 2d 285, 286 (9 Cir. 1952), *cert. denied*, 344 U. S. 827; *United States* v. *Poppa*, 190 F. 2d 112, 114-15 (7 Cir. 1951). Judicial unwillingness to hear objections to a duplicitous indictment raised for the first time after verdict would appear to apply, *a fortiori*, to such objections raised for the first time on a motion under 28 U.S.C. § 2255. See *Dunn* v. *United States*, 234 F. 2d 219, 221 (6 Cir. 1956), *cert. denied*, 352 U. S. 899; *Masi* v. *United States*, 223 F. 2d 132 (5 Cir. 1955), *cert. denied*, 350 U. S. 919; *United States* v. *Richie*, 222 F. 2d 436, 437 (3 Cir. 1955). True it is that in a case involving the identical count of the indictment presently before us it was held that an objection to a duplicitous count may be raised for the first time by a motion under 28 U. S. C. § 2255 if the two offenses charged in the count are not subject to punishment of the same severity. *United States* v. *Shackleford*, 180 F. Supp. 857 (S. D. N. Y. 1957). The prior cases offer no support for this distinction, and we think it peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty (here either 26 U. S. C. § 7237(a) or 18 U. S. C. § 371), but not under the statute which imposes

the greater penalty (21 U. S. C. § 174). We hold that appellants have waived any objection to any duplicity in the indictment. Therefore, we do not reach the question of whether Count 14 was in fact duplicitous.

Carminati's contention that he should be given an opportunity for resentence because he was denied the right of allocution provided for in Rule 32(a) of the Federal Rules of Criminal Procedure is in this case so plainly without merit that we are not required to consider the question of whether this contention may be raised by a motion under 28 U. S. C. § 2255. See concurring opinion in *Couch* v. *United States*, 235 F. 2d 519, 521 (D. C. Cir. 1956). As we have indicated above, no defense was presented that would have afforded a rational basis for concluding that Carminati was guilty only of a violation of 26 U. S. C. § 7237(a) or 18 U. S. C. § 371 and not 21 U. S. C. § 174. Accordingly, the district judge had no alternative but to sentence Carminati under 21 U. S. C. § 174. Under that section the minimum sentence for a second offender, as Carminati is conceded to be, is ten years, Carminati's present sentence. As the district judge aptly observed, to require resentence under these circumstances would be to exalt form over substance.

Affirmed.